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No. 90-1053

In The

# Supreme Court of the United States

October Term, 1990

THE MEDICAL PROTECTIVE COMPANY,

*Petitioner,*

v.

RONALD TODD,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## LIST OF PARTIES

The Medical Protective Company and Fletcher Bell were the parties to the proceedings below. Fletcher Bell was originally named as defendant in his capacity as Commissioner of Insurance for the State of Kansas and administrator of the Kansas Health Care Stabilization Fund. On January 14, 1991, Ronald Todd succeeded Fletcher Bell as Commissioner of Insurance for the State of Kansas and as administrator of the Kansas Health Care Stabilization Fund. United States Supreme Court Rule 35.3 provides that when a public officer who is a party to the proceeding ceases to hold office, his successor in office is automatically substituted as a party. Ronald Todd therefore was automatically substituted as a party to this action on January 14, 1991.

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## STATEMENT OF THE CASE

### 1. Factual Background

The Kansas Health Care Provider Insurance Availability Act, K.S.A. § 40-3401 *et seq.* (the "Kansas Act"), requires that every health care provider residing in, licensed in, or functioning in Kansas maintain a specified minimum amount of professional liability insurance. In this case, the operative minimum amount of professional liability insurance is $100,000. K.S.A. § 40-3402.[1] When a claim is brought against a covered health care provider for medical malpractice, the Kansas Act states that the insurer of the health care provider is liable only for the first $100,000 of a claim. K.S.A. § 40-3408. Resources of the Kansas Health Care Stabilization Fund (the "Kansas Fund"), created under the Kansas Act, K.S.A. § 40-3403, may then be expended to pay the remainder of a claim. However, the Kansas Act further provides that "if any liability insurance in excess of [the specified $100,000 minimum amount] is applicable to any claim or would be applicable in the absence of this act, any payment from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act." K.S.A. § 40-3408.

The Medical Protective Company ("Medical Protective") issued individual policies of professional liability insurance to Andrew B. Kaufman, M.D. and Robert Morantz, M.D., both of whom are health care providers under the terms of the Kansas Act. The liability limit of each

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[1] The current statutory minimum, although not applicable, is $200,000.

physician's policy was the minimum $100,000 per occurrence required under the Kansas Act. K.S.A. § 40-3402. In addition, Medical Protective issued a third policy of professional liability insurance to the physicians' employer, Arnold Schoolman, M.D., a Missouri corporation (the "Schoolman Corporation"). The liability limit of this third policy was $1,000,000 per occurrence.

In 1986, Medical Protective settled an underlying medical malpractice action against the physicians and the Schoolman Corporation for $715,000. Of this amount, $200,000 was paid by Medical Protective out of its respective coverages on Drs. Kaufman and Morantz. Medical Protective also paid $515,000 out of its coverage on the Schoolman Corporation. Prior to settling the case, Medical Protective demanded that the Kansas Fund assume responsibility for $515,000, the amount in excess of the physicians' liability limits. It has been Medical Protective's position that K.S.A. § 40-3403 obligates the Kansas Fund to pay a claim if it exceeds the liability limit of the insurance of individual health care providers. The Kansas Fund declined to pay on the grounds that all three policies issued by Medical Protective were applicable, and that pursuant to the Kansas Act any payment from the Kansas Fund would be excess over the combined liability limits of all three policies. K.S.A. § 40-3408. Medical Protective does not address the effect of K.S.A. § 40-3408 in its petition now before this Court.

Medical Protective asserts as fact that the liability of the "Schoolman Corporation" in the underlying medical malpractice action was vicarious. Contrary to Medical Protective's assertion, however, the allegations of negligence as to all defendants in the malpractice action were of direct and active negligence. Vicarious liability was

never pleaded. There was not even an allegation in the malpractice action that Drs. Kaufman and Morantz were employees of the Schoolman Corporation. In fact, the malpractice petition seems to allege a claim against the Schoolman Corporation for acts other than those of Drs. Kaufman and Morantz.

Significantly, the malpractice petition, which sought judgment against Dr. Kaufman, Dr. Morantz, and the Schoolman Corporation jointly and severally, remained on file without amendment for approximately three years. Even at the point of settlement immediately prior to trial, the petition was not amended. Thus, at no time in the malpractice action were there allegations even remotely suggesting that the Schoolman Corporation's liability was vicariously based on the acts of Drs. Kaufman and Morantz. Throughout this case, Medical Protective's claim that the Schoolman Corporation's liability was only vicarious has been vigorously disputed. Therefore, while the Kansas Act precludes recovery by Medical Protective as a matter of law even if vicarious liability is assumed, the existence of vicarious liability such that Medical Protective can properly claim a right of subrogation is a contested matter.

Medical Protective also erroneously characterizes the Kansas Fund simply as an excess insurance carrier. The Kansas Fund is not a private insurer, which might typically provide coverage to an insured and make payment pursuant to a contractual relationship with the insured. Instead, the Kansas Fund is a public entity. The Kansas Fund provides coverage and makes payments only when a statute duly enacted by the Kansas legislature authorizes it to do so. The issue herein is not, as Medical Protective contends, a coverage dispute between an

excess carrier for the physicians and an insurance carrier for the vicariously liable employer. The issue actually presented is whether the Kansas Act permits the Kansas Fund to contribute toward a malpractice settlement involving Kansas physicians when a non-resident professional corporation separately carries liability insurance that will cover the amount of the settlement, to the extent that the settlement exceeds the physicians' liability insurance limits. Simply put, this is a case requiring the interpretation and application of Kansas law by the federal courts.

## 2. Proceedings in the Lower Courts

Medical Protective filed a request for declaratory relief in the United States District Court for the Western District of Missouri against the Commissioner of Insurance for the State of Kansas, who also serves as administrator of the Kansas Fund.[2] Medical Protective sought reimbursement of $515,000 paid on behalf of the Schoolman Corporation in settlement of the underlying malpractice claim. In its order of May 10, 1989, the district court held that Medical Protective was entitled to reimbursement from the Kansas Fund. The district court reached this conclusion without aid of the Kansas Supreme Court's construction of section 40-3408 of the Kansas Act, as the state court had not yet made its ruling

[2] On January 14, 1991, Ronald Todd succeeded Fletcher Bell as Commissioner of Insurance for the State of Kansas and as administrator of the Kansas Fund. Pursuant to United States Supreme Court Rule 35.3, Mr. Todd is automatically substituted as the proper party in this action.

in *Obstetrics & Gynecology, Ltd. v. Buckner*, 247 Kan. 170, 795 P.2d 386 (1990). Despite the fact that the Kansas Fund was created and controlled by statute, the district court erroneously concluded that the Kansas Act was to be applied only after a "path of liability" had been determined. The district court further concluded in error that Missouri law applied to a determination of the Fund's coverage, even though the district court acknowledged that "the fund is created and operated by Kansas statute" and that "the fund's rights and duties arise from a Kansas statute, rather than from a traditional insurance contract." *The Medical Protective Company v. Bell*, 716 F. Supp. 392, 397 (W.D. Mo. 1989).

In its opinion filed August 21, 1990, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court. The court of appeals rejected the district court's analysis, noting that the sole question was "whether the [Kansas Act] permitt[ed] the [Kansas] Fund to contribute toward a malpractice settlement against Kansas physicians whose nonresident professional corporation carries liability insurance covering the settlement." *The Medical Protective Company v. Bell*, 912 F.2d 244 (8th Cir. 1990). The Eighth Circuit held that the Kansas Act barred payment from the Kansas Fund if the professional corporation's liability insurance was adequate to satisfy a settlement that exceeded the required minimum coverage of the corporation's liable employees. *Id.* at 245. This ruling was made in reliance upon the decision in *Buckner*, wherein the Kansas Supreme Court reached a similar result by interpreting and applying the Kansas Act in a factual situation nearly identical to that in this case.

## REASONS FOR DENYING THE PETITION

Medical Protective has presented a very narrow question for review by this Court. Although it makes vague references to the equal protection clause, the privileges and immunities clause, and the commerce clause, Medical Protective has not claimed that these constitutional provisions are directly applicable. Any such claim, if made, would be completely lacking in legal or factual foundation. No valid constitutional question is raised by the Kansas Act itself, or the Kansas Supreme Court's decision in *Buckner*. The only constitutional issue actually asserted by Medical Protective concerns a purported deprivation of an Article III right to federal diversity jurisdiction. In reality, the sole issue is whether a federal court sitting in diversity should give effect to the construction of a state statute by the highest court of that state, or whether the federal court should independently examine the state statute and substitute its judgment for that of the state court.

The essence of Medical Protective's argument is that the federal court in this case should have disregarded the decision of a state's highest court that has construed one of that state's statutes, and indulged in an independent examination and interpretation of the statute. Medical Protective's position is fundamentally inconsistent with this Court's sound and historic decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 188 (1938). As the Court warned in *Erie*, for a federal court to exercise independent judgment regarding what a state law should be, would lead to undesirable practices in the selection of a forum and the inequitable administration of justice.

In *Buckner*, the Kansas Supreme Court held that section 40-3408 of the Kansas Act requires that all coverage applicable to a claim, including coverage issued to a vicariously liable professional corporation, must be exhausted prior to the Kansas Fund assuming responsibility for the claim. Therefore, *Buckner* is dispositive and precludes recovery by Medical Protective. The Eighth Circuit, which was required to apply the terms of the Kansas Act, properly did so in reliance upon and in keeping with the Kansas court's interpretation of the Kansas Act.

**1. The Decision In *Erie Railroad Company v. Tompkins* Requires Denial Of The Petition.**

Medical Protective argues that the Eighth Circuit should not have accepted the Kansas Supreme Court's ruling as to the meaning of the Kansas Act. Medical Protective's position directly contradicts the decision of this Court in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). In *Erie*, the Court held that a federal court sitting in diversity must apply the law of the state as declared by the state's highest court, and may not exercise independent judgment as to what the law of the state should be. The Court concluded that pre-*Erie* precedent had led to injustice, confusion, and efforts to abolish or limit diversity jurisdiction. 304 U.S. at 77. The Court observed that differing decisions in state and federal courts as to the same issue prevented uniformity in the law. *Id.* at 74. In addition, the Court found that the exercise of independent judgment by the federal courts as to matters of state law led to discrimination.

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law.

*Id.* at 74-75. The Court also recognized that the federal courts ought not interfere with the independence of the states by declaring what the law of a state should be.

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in the legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

*Id.* at 79.

In *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941), the Court warned that independent determinations by federal courts of the "better view" of state law, without regard to the state's interpretation of its own law, "would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." 313 U.S. at 496. Thus, the Court held that the proper function

of the federal court in a diversity case "is to ascertain what the state law is, not what it ought to be." *Id.* at 497. Similarly, in *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965), the Court found that "it would be unfair for the character or result of litigation materially to differ because the suit had been brought in a federal court," as opposed to state court. 380 U.S. at 467. The purpose of *Erie* was the "discouragement of forum shopping and avoidance of inequitable administration of the law." *Id.* at 468.

Medical Protective essentially makes the type of argument that has repeatedly been rejected under an *Erie* analysis. The very concerns expressed by the *Erie* Court caution that a federal court sitting in diversity should not disregard a state court's interpretation of that state's law. A federal court applying a state statute in a diversity case is in substance "only another court of the State." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 76 S. Ct. 273, 100 L.Ed. 199 (1956). Allowing federal courts instead to exercise independent judgment with regard to what state law should be, would lead to nonuniformity in the law and forum shopping, and would involve an invasion of the state's independence. Thus, the Eighth Circuit's proper application of established Kansas law in this case was entirely proper, if not mandatory.

It also should be noted that Medical Protective has failed to cite any valid authority for the proposition that in a diversity case, a federal court should ignore a state court's interpretation of that state's law and independently determine what state law should be. Medical Protective presents its view of the general policy and

purpose underlying the creation of federal diversity jurisdiction, and suggests that in this case it was denied an impartial tribunal. The problem with Medical Protective's position is that regardless of whether the tribunal is state or federal, or located within or outside Kansas, Medical Protective is still subject to the same governing law, which is a Kansas statute and the Kansas Supreme Court's interpretation of that statute.

**2. The Eighth Circuit Properly Relied Upon the Kansas Supreme Court's Construction of the Kansas Statute at Issue in This Case.**

A state court has final authority to interpret that state's legislation. Federal courts not only accept, but are bound by, the construction given to a state's statutes by its courts. *Garner v. Louisiana*, 368 U.S. 157, 166, 82 S. Ct. 248, 7 L.Ed.2d 207 (1961); *Aero Mayflower Transit Company v. Board of Railroad Commissioners*, 332 U.S. 495, 499, 68 S. Ct. 167, 92 L.Ed. 99 (1947); *Lauf v. E. G. Schinner & Co.*, 303 U.S. 323, 328, 58 S. Ct. 578, 82 L.Ed. 872 (1938). Indeed, the construction of a state statute by the highest court of the state must be treated as if it had been incorporated into the words of the statute. *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 97 L.Ed. 1105 (1953).

The Eighth Circuit followed these principles in this case, stating that it was "bound by the construction given the statute by the highest court within the state." *The Medical Protective Company v. Bell*, 912 F.2d at 245. The Eighth Circuit rejected the analysis of the district court, and concluded that the Kansas Act was controlling as to the Kansas Fund's obligations. In determining that the

Kansas Fund was not required to reimburse Medical Protective for the amount in excess of the primary coverage issued to the two physicians, the Eighth Circuit adopted the construction of the Kansas Act as set forth by the Kansas Supreme Court in *Buckner*. Such action by the Eighth Circuit is entirely in keeping with this Court's admonition that a federal court sitting in diversity should give effect to a state's interpretation of its own law.[3]

Medical Protective's argument that it was deprived of the independent judgment of the federal judiciary through the Eighth Circuit's adoption of *Buckner* is meritless. In short, Medical Protective asks this Court to reject a portion of the *Erie* doctrine. If Medical Protective prevails, a federal court sitting in diversity would no longer be expected to follow the interpretation of a state statute as set forth by that state's highest court. Instead, the federal court could independently examine the statute, and substitute its judgment for that of the state court where the federal court deems the state court's interpretation to be incorrect. This is precisely the result *Erie* sought to avoid, and which the Eighth Circuit refused to sanction.

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[3] Significantly, the district court similarly observed that "[j]ust as the Kansas legislature cannot change a Missouri law, a court sitting in Missouri cannot change Kansas statutes. Rather, application of Kansas statutes includes application of the Kansas case law construing those statutes. . . . Further, federal courts look to the decisions of the highest court of the state as the final authority on state law." *The Medical Protective Company v. Bell*, 716 F. Supp. at 397. Presumably, even the district court would have found against Medical Protective had the Kansas Supreme Court's decision in *Buckner* been rendered prior to the district court's decision in this case.

### 3. The Kansas Supreme Court Properly Applied The Kansas Act In *Buckner*.

Medical Protective argues that *Buckner* is "untenable" because the Kansas Supreme Court failed to analyze the *Buckner* case in a manner similar to the analysis employed by the district court in this case. In so arguing, Medical Protective fails to address the actual analysis of the Kansas Act made by the Kansas court. Moreover, Medical Protective fails to mention section 40-3408 of the Kansas Act, upon which *Buckner* principally is based.

In the Kansas case, Dr. Buckner, a Kansas health care provider, and his employer, a Missouri corporation, were named as defendants in a medical malpractice action. St. Paul Fire and Marine Company ("St. Paul") insured both parties. An individual policy, with a liability limit of $100,000 per occurrence, insured Dr. Buckner. A separate policy with a liability limit of $1,000,000 per occurrence insured the professional corporation. St. Paul ultimately settled the underlying malpractice claim for $600,000. St. Paul then brought an action against Dr. Buckner seeking indemnification. In addition, St. Paul sought to recover directly against the administrator of the Kansas Fund for those amounts paid in excess of the coverage issued to Dr. Buckner.

The ultimate issue as noted by the Kansas Supreme Court was whether the Kansas Fund's coverage commenced after Dr. Buckner's policy limit had been exhausted, or only after the corporation's policy limit had also been exhausted. After reviewing the history of the Kansas Act and prior case law construing the Kansas Act, the Kansas Supreme Court held that the following portion of section 40-3408 was controlling:

> If any liability insurance in excess of such amounts [the $100,000 in coverage each health care provider is required to maintain under the Kansas Act] is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act.

*Buckner*, 795 P.2d at 392. The Kansas court concluded that the professional corporation purchased the policy to provide coverage for claims based upon vicarious liability, and that such coverage was therefore applicable coverage. *Id.* As the claim was settled within the coverage issued to the physician and his professional corporation, the court found that the Kansas Fund had no obligation to contribute toward the settlement.

*Buckner* does not, as Medical Protective argues, reflect an unequal application of the Kansas statutory scheme against those entitled to its benefits. Consistent with section 40-3408 of the Kansas Act, health care providers continue to receive coverage for any claims made against them once all applicable coverage has been exhausted. Moreover, it is important to note that an out-of-state insured such as the Schoolman Corporation, has no right to the benefits of the Kansas Fund. As the court found in *Buckner*, the Kansas legislature surely did not intend for an insured who has not paid the premium surcharge required by the Kansas Act to obtain a "free ride on the Fund." Likewise, Medical Protective as insurer of the Schoolman Corporation is not entitled to profit at the expense of this public fund.

It was unnecessary for the court in *Buckner* to engage in a legal analysis similar to that of the district court in

this case. The Kansas Supreme Court recognized that the Kansas Fund was created and controlled by statute, and could provide coverage and make payment only when the governing statutes so provide. Specifically, the Kansas court properly gave effect to the plain meaning of section 40-3408 of the Kansas Act. There was no need to consider, much less comment upon, the district court's decision in this case, which was based upon a flawed analysis and which failed properly to implement Kansas law.

**4. *Buckner* Is Consistent With Established Law.**

Despite Medical Protective's contention, *Buckner* is not inconsistent with the prior decision of the Eighth Circuit in *Pacific National Insurance Co. v. Transport Insurance Co.*, 341 F.2d 514 (8th Cir.), *cert. denied*, 381 U.S. 912, 85 S. Ct. 1536, 14 L. Ed.2d 434 (1965). The facts of and legal analysis applied by the court in *Pacific National* are distinct from the facts of and legal analysis in *Buckner*. *Pacific National* involved a coverage dispute between two private insurance carriers. *Buckner* involved a public fund, and interpretation of the state statutory framework under which the fund must be operated. Section 40-3408 of the Kansas Act, which precludes any recovery by Medical Protective in this case, was not before the court in *Pacific National*.

*Buckner* in no way undermines the general principle that an employee's insurance must be exhausted before the insurer of a vicariously liable employer may be reached. In this case, the coverage provided to the physicians was exhausted prior to responsibility for the claim passing to the Schoolman Corporation. The additional

coverage provided by the Kansas Fund would apply pursuant to section 40-3408, only after all other applicable insurance coverage, *i.e.*, Medical Protective's coverage of the Schoolman Corporation, was exhausted.

The Eighth Circuit correctly recognized *Buckner* as controlling in this case. The Eighth Circuit understood that the Kansas Fund could make payment only in accordance with the terms of the Kansas Act. In adopting *Buckner,* the appeals court simply applied the Kansas Act as that state's highest court has interpreted and would apply the Act.

## CONCLUSION

For the reasons stated herein, The Medical Protective Company's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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# APPENDIX

## KANSAS STATUTES ANNOTATED

### Article 34. – HEALTH CARE PROVIDER INSURANCE

**40-3401.** Definitions. As used in this act the following terms shall have the meanings respectively ascribed to them herein:

(a) "Applicant" means any health care provider;

(b) "Basic coverage" means a policy of professional liability insurance required to be maintained by each health care provider pursuant to the provisions of subsection (a) or (b) of K.S.A. 40-3402;

(c) "Commissioner" means the commissioner of insurance;

(d) "Fiscal year" means the year commencing on the effective date of this act and each year, commencing on the first day of that month, thereafter;

(e) "Fund" means the health care stabilization fund established pursuant to subsection (a) of K.S.A. 40-3403;

(f) "Health care provider" means a person licensed to practice any branch of the healing arts by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts issued by the state board of healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts, a medical care facility licensed by the department of health and environment, a health maintenance organization issued a certificate of authority by the commissioner of insurance, an optometrist

licensed by the board of examiners in optometry, a podiatrist registered by the state board of healing arts, a pharmacist registered by the state board of pharmacy, a licensed professional nurse who is licensed by the board of nursing and certified as a nurse anesthetist by the American association of nurse anesthetists, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a dentist certified by the state board of healing arts to administer anesthetics under K.S.A. 65-2899, a physical therapist registered by the state board of healing arts, or a mental health center or mental health clinic licensed by the secretary of social and rehabilitation services;

(g) "Inactive health care provider" means a person or other entity who purchased basic coverage or qualified as a self-insurer on or subsequent to the effective date of this act but who, at the time a claim is made for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider, does not have basic coverage or self-insurance in effect solely because such person is no longer engaged in rendering professional service as a health care provider;

(h) "Insurer" means any corporation, association, reciprocal exchange, inter-insurer and any other legal entity authorized to write bodily injury or property damage liability insurance in this state, including workmen's compensation and automobile liability insurance, pursuant to the provisions of article 9, 11, 12 or 16 of chapter 40 of Kansas Statutes Annotated;

(i) "Plan" means the operating and administrative rules and procedures developed by insurers and rating organizations or the commissioner to make professional liability insurance available to health care providers;

(j) "Professional liability insurance" means insurance providing coverage for legal liability arising out of the performance of professional services rendered or which should have been rendered by a health care provider;

(k) "Rating organization" means a corporation, an unincorporated association, a partnership or an individual licensed pursuant to K.S.A. 40-930 or K.S.A. 40-1114, or both sections, to make rates for professional liability insurance;

(l) "Self-insurer" means a health care provider who has qualified as a self-insurer pursuant to K.S.A. 40-3414, and amendments thereto;

(m) "Medical care facility" means the same when used in the health care provider insurance availability act as the meaning ascribed to that term in K.S.A. 65-425, except that as used in the health care provider insurance availability act such term, as it relates to insurance coverage under the health care provider insurance availability act, also includes any director, trustee, officer or administrator of a medical care facility;

(n) "Mental health center" means a mental health center licensed by the secretary of social and rehabilitation services under K.S.A. 1980 Supp. 75-3307b, except that as used in the health care provider insurance availability act such term, as it relates to insurance coverage

under the health care provider insurance availability act, also includes any director, trustee, officer or administrator of a mental health center;

(o) "Mental health clinic" means a mental health clinic licensed by the secretary of social and rehabilitation services under K.S.A. 1980 Supp. 75-3307b, except that as used in the health care provider insurance availability act such term, as it relates to insurance coverage under the health care provider insurance availability act, also includes any director, trustee, officer or administrator of a mental health clinic;

(p) "State institution for the mentally retarded" means Norton state hospital, Winfield state hospital and training center, Parsons state hospital and training center and the Kansas neurological institute.

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**40-3402.** Professional liability insurance to be maintained by health care providers as condition to rendering services in state, exception, limits of coverage; information to be furnished by insurer; termination of coverage, notice; contents of policies issued in state; duties of certain insurance companies; surcharge and information required of nonresident health care providers and self-insurers. (a) A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than one

hundred thousand dollars ($100,000) per occurrence, subject to not less than a three hundred thousand dollar ($300,000) annual aggregate for all claims made during the policy period, shall be maintained in effect by each resident health care provider as a condition to rendering professional service as a health care provider in this state, unless such health care provider is a self-insurer. Such policy shall provide as a minimum coverage for claims made during the term of the policy which were incurred during the term of such policy or during the prior term of a similar policy.

(1) Each insurer providing basic coverage shall within thirty (30) days after the premium for the basic coverage is received by the insurer or within thirty (30) days from the effective date of this act, whichever is later, notify the commissioner that such coverage is or will be in effect. Such notification shall be on a form approved by the commissioner and shall include information identifying the professional liability policy issued or to be issued, the name and address of all health care providers covered by the policy, the amount of the annual premium, the inception and expiration dates of the coverage and such other information as the commissioner shall require. A copy of the notice required by this subsection shall be furnished the named insured.

(2) In the event of termination of basic coverage by cancellation, nonrenewal, expiration or otherwise by either the insurer or named insured, notice of such termination shall be furnished by the insurer to the commissioner, the state agency which licenses, registers or certifies the named insured and the named insured. Such notice shall be provided no less than thirty (30) days

prior to the effective date of any termination initiated by the insurer or within ten (10) days after the date coverage is terminated at the request of the named insured and shall include the name and address of the health care provider or providers for whom basic coverage is terminated and the date basic coverage will cease to be in effect. No basic coverage shall be terminated by cancellation or failure to renew by the insurer unless such insurer provides a notice of termination as required by this subsection.

(3) Any professional liability insurance policy issued, delivered or in effect in this state on and after the effective date of this act shall contain or be endorsed to provide basic coverage as required by subsection (a) of this section. Notwithstanding any omitted or inconsistent language, any contract of professional liability insurance shall be construed to obligate the insurer to meet all the mandatory requirements and obligations of this act.

(b) Unless a nonresident health care provider is a self-insurer, such provider shall not render professional service as a health care provider in this state unless such provider maintains coverage in effect as prescribed by subsection (a) of this section, except such coverage may be provided by a non-admitted insurer who has filed the form required in paragraph (1) of subsection (b) of this section.

(1) Every insurance company authorized to transact business in this state, that is authorized to issue professional liability insurance in any jurisdiction, shall file with the commissioner, as a condition of its continued

transaction of business within this state, a form prescribed by the commissioner declaring that its professional liability insurance policies, wherever issued, shall be deemed to provide at least the insurance required by this subsection when the insured is rendering professional services as a nonresident health care provider in this state. Any non-admitted insurer may file such a form.

(2) every nonresident health care provider who is required to maintain basic coverage pursuant to this subsection shall pay the surcharge levied by the commissioner pursuant to subsection (a) of K.S.A. 40-3404 directly to the commissioner and shall furnish to the commissioner the information required in paragraph (1) of subsection (a) of this section.

(c) Every health care provider that is a self-insurer shall pay the surcharge levied by the commissioner pursuant to subsection (a) of K.S.A. 40-3404 directly to the commissioner and shall furnish to the commissioner the information required in paragraph (1) of subsection (a) of this section.

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**40-3403.** Health care stabilization fund; establishment; administration; liability of fund; payments from fund; qualification of health care provider for coverage under fund. (a) For the purpose of paying damages for personal injury or death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider

subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

(b) The fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-insurers for any such injury or death arising out of the rendering of or the failure to render professional services within or without this state; (2) any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable nonresident health care providers or nonresident self-insurers for any such injury or death arising out of the rendering or the failure to render professional services within this state. In no event shall the fund be obligated for claims against nonresident health care providers or nonresident self-insurers who have not complied with this act or for claims against nonresident health care providers or non-resident self-insurers that arose outside of this state; (3) any amount due from a judgment or settlement against a resident inactive health care provider for any such injury or death; (4) any amount due from a judgment or settlement against a nonresident inactive health care provider for any injury or death arising out of the rendering or failure to render professional services within this state. In no event shall the fund be obligated for claims against: (A) Nonresident

inactive health care providers who have not complied with this act; or (B) nonresident inactive health care providers for claims that arose outside of this state, unless such health care provider was a resident health care provider or resident self-insurer at the time such act occurred; (5) reasonable and necessary expenses for attorney's fees incurred in defending the fund against claims; (6) any amounts expended for reinsurance obtained to protect the best interests of the fund purchased by the committee on surety bonds and insurance pursuant to K.S.A. 1980 Supp. 75-4101; (7) reasonable and necessary actuarial expenses incurred in administering the act; and (8) annually to the plan or plans, any amount assessed or assessable from insurers under any plan or plans existing pursuant to K.S.A. 40-3413.

(c) All amounts for which the fund is liable pursuant to paragraphs (1), (2), (3) or (4) of subsection (b) of this section shall be paid promptly and in full if less than three hundred thousand dollars ($300,000) or if three hundred thousand dollars ($300,000) or more by installment payments of three hundred thousand dollars ($300,000) per fiscal year, the first installment to be paid within sixty (60) days after the fund becomes liable and each subsequent installment to be paid annually on the same date of the year the first installment was paid, until the claim has been paid in full. Any attorney's fees payable from such installment shall be similarly prorated.

(d) A health care provider shall be deemed to have qualified for coverage under the fund: (1) On and after the effective date of this act if basic coverage is then in effect; (2) subsequent to the effective date of this act, at such time as basic coverage becomes effective; or (3)

upon qualifying as a self-insurer pursuant to K.S.A. 40-3414.

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**40-3408.** Liability of insurer or self-insurer for injury or death arising out of act or commission of health care provider, limitation; fund coverage excess over liability insurance coverage. The insurer of a health care provider covered by the fund or self-insurer shall be liable only for the first one hundred thousand dollars ($100,000) of a claim for personal injury or death arising out of the rendering of or the failure to render professional services by such health care provider, subject to an annual aggregate of three hundred thousand dollars ($300,000) for all such claims against the health care provider. However, if any liability insurance in excess of such amounts is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act.

If any inactive health care provider has liability insurance in effect which is applicable to any claim or would be applicable in the absence of this act, any payments from the fund shall be excess over such amounts paid, payable or that would have been payable in the absence of this act.

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